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C VIGNESH KUMAR CHELLAPAH & ANOR v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
RHODZARIAH BUJANG JCA
MOHAMAD ZABIDIN DIAH JCA
B [CRIMINAL APPEAL NO: W-05-221-04-2018]
19 JULY 2019

CRIMINAL LAW: *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Section 61 – Appellants applied to be*
C *at liberty to attend before court to show why property should not be forfeited and to be declared as bona fide third parties – High Court Judge dismissed application on grounds that it should be made in Sessions Court – Appellants appealed against High Court decision – Preliminary objections raised – Whether appeal competent – Whether appeal academic – Whether appellants' rights to be heard by all three*
D *tiers of court preserved*

CIVIL PROCEDURE: *Appeal – Competency of – Appeal against High Court Judge's decision in dismissing appellants' application to be at liberty to attend before court to show why property should not be forfeited and to be declared as bona fide third parties – Whether order of High Court Judge was only to direct application*
E *be filed in Sessions Court – Whether there was final determination of appellants' rights – Whether appeal academic – Whether appellants' rights to be heard by all three tiers of court preserved – Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 61*

F The appellants' joint application was for the following main relief: that they be at liberty to attend before the court to show cause why the property in the Schedule to Federal Government *Gazette* PU(B) 53 should not be forfeited and to be declared as *bona fide* third parties within the meaning of s. 61 of Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'). The first appellant was acting as
G counsel for, whilst the second appellant was the legal advisor (employee) of, Syarikat Noradz Travel & Services Sdn Bhd ('Noradz') who was charged, with three other persons, in the Sessions Court for offences under the Act as well as under the Banking and Financial Institutions Act 1989 ('BAFIA'). These accused persons had been found guilty by the Sessions Court Judge and
H sentenced accordingly. The properties of Noradz had earlier been seized and forfeited under s. 55 of the Act. The first appellant claimed that his legal and professional fees which were incurred whilst acting for Noradz amounting to RM1,539,800 had not been paid. The second appellant in turn claimed that his salary had not been paid. Thus, they both filed the said application to be
I allowed to present their claims which they contended ought to be paid to them from the forfeited property. The High Court Judge dismissed the said application because His Lordship was of the view that it should have been made in the Sessions Court first. His Lordship further held that filing the

application straight away to the High Court was an abuse of the court's process. Thus, the appellants appealed. At the hearing of the appeal against the said decision, the Deputy Public Prosecutor ('DPP') raised a preliminary objection (i) that the appeal was not competent; (ii) that the appeal did not comply with s. 50 of the Courts of Judicature Act 1964 ('the CJA'); and (iii) that the appeal was academic.

Held (dismissing appeal)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) Although the application was not filed and the decision made was not in the course of a trial, nevertheless it did not finally dispose of the rights of the appellants because the order of the High Court Judge was only to direct that the application be filed in the Sessions Court where as rightly pointed out by the High Court Judge, the source for payment of the claim, that was, the forfeited property, was. The High Court Judge did not dismiss the application outright and therefore there was no final determination of the appellants' right by the court for that was kept at abeyance until the disposal of it by the Sessions Court. (paras 7 & 8)

(2) Following the dismissal of the appellants' application by the High Court Judge, the appellants did file their application before the Sessions Court. Their application was dismissed and the matter was brought up on appeal to the High Court. At the time of the hearing of this appeal, that appeal in the High Court was still pending. Therefore, this appeal was academic. (para 10)

(3) As for the preservation of the appellants' rights and avoidance of laches, these reasons simply could not stand as a ground to allow the appeal to go on because the simple and obvious fact was that the appellants had submitted themselves to the jurisdiction of the Sessions Court. Having done so, the full consequence of that action would be the litigation of that right not just in the Sessions Court but further to the High Court and before this court on appeal. Thus, their rights to be heard by all three tiers of the courts had indeed been preserved. Therefore, the preliminary objections of the DPP was allowed. (paras 10 & 11)

Bahasa Malaysia *Headnotes*

Permohonan bersama oleh perayu-perayu adalah untuk relief berikut: bahawa mereka diberikan kebebasan untuk hadir di mahkamah untuk menunjukkan kausa mengapa hartanah dalam Jadual *Warta* Kerajaan Persekutuan PU(B) 53 tidak boleh dilucuthakkan dan untuk diisytiharkan sebagai pihak ketiga *bona fide* dalam maksud s. 61 Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('Akta'). Perayu pertama bertindak sebagai peguam untuk, sementara perayu kedua adalah penasihat undang-undang, Syarikat Noradz Travel & Services Sdn Bhd ('Noradz') yang telah dituduh, dengan tiga orang lain, di Mahkamah Sesyen untuk kesalahan-kesalahan

bawah Akta dan juga bawah Akta Bank dan Institusi-Institusi Kewangan Malaysia 1989 ('BAFIA'). Tertuduh-tertuduh ini telah didapati bersalah oleh Hakim Mahkamah Sesyen dan dijatuhkan hukuman. Hartanah-hartanah Noradz telah sebelum ini dirampas dan dilucuthakkan bawah s. 55 Akta. Perayu pertama menuntut bahawa yuran undang-undang dan profesional yang ditanggung semasa bertindak untuk Noradz berjumlah RM1,539,800 tidak dibayar. Perayu kedua pula menuntut gajinya yang tidak dibayar. Oleh itu, kedua-dua perayu memfailkan permohonan tersebut untuk membenarkan mereka membentangkan tuntutan mereka bahawa pembayaran harus dibuat kepada mereka daripada hartanah yang telah dilucuthakkan. Hakim Mahkamah Tinggi menolak permohonan tersebut kerana beliau berpendapat bahawa permohonan harus dibuat di Mahkamah Sesyen terlebih dahulu. Hakim Mahkamah Tinggi juga memutuskan bahawa pemfailan permohonan di Mahkamah Tinggi adalah satu penyalahgunaan proses. Oleh itu, perayu-perayu merayu. Di perbicaraan rayuan terhadap keputusan tersebut, Timbalan Pendakwa Raya ('TPR') membangkitan bantahan awalan bahawa (i) rayuan tidak kompeten; (ii) rayuan tidak mematuhi s. 50 Akta Mahkamah Kehakiman 1964 ('AMK'); dan (iii) rayuan adalah akademik.

Diputuskan (menolak rayuan)
Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Walaupun permohonan tidak difailkan dan keputusan tidak dibuat semasa perbicaraan, ini tidak melupuskan hak perayu-perayu secara muktamad kerana perintah Hakim Mahkamah Tinggi hanya untuk memerintahkan permohonan difailkan di Mahkamah Sesyen dan seperti yang dengan betulnya telah dinyatakan oleh Hakim Mahkamah Tinggi, sumber pembayaran tuntutan, iaitu hartanah yang dilucuthakkan, di situ. Hakim Mahkamah Tinggi tidak menolak permohonan sepenuhnya dan dengan itu tiada keputusan muktamad hak-hak perayu-perayu oleh mahkamah kerana perkara itu dibiarkan begitu sahaja sehingga pelupusannya oleh Mahkamah Sesyen.

(2) Berikutan penolakan permohonan perayu-perayu oleh Hakim Mahkamah Tinggi, perayu-perayu memfailkan permohonan mereka di Mahkamah Sesyen. Permohonan mereka ditolak dan perkara itu dirayu ke Mahkamah Tinggi. Pada masa perbicaraan ini, rayuan di Mahkamah Tinggi masih belum selesai. Oleh itu, rayuan ini adalah akademik.

(3) Berkaitan pengekalan hak-hak perayu-perayu dan pengelakan *laches*, alasan-alasan ini tidak boleh dipertahankan sebagai alasan membenarkan rayuan diteruskan kerana fakta yang jelas adalah perayu-perayu telah menyerahkan diri mereka ke bidang kuasa Mahkamah Sesyen. Setelah berbuat demikian, akibat penuh tindakan itu adalah untuk litigasi hak itu bukan hanya di Mahkamah Sesyen tetapi seterusnya di Mahkamah Tinggi dan di hadapan mahkamah ini atas rayuan. Oleh itu, hak-hak mereka untuk didengar oleh semua tiga peringkat mahkamah telah pun dikekalkan. Dengan itu, bantahan awalan TPR dibenarkan.

Case(s) referred to:
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
Totti Trading v. PP [2018] 7 CLJ 218 CA ***(dist)***

Legislation referred to:
Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 4(1), 44, 55, 56, 61(4)
Courts of Judicature Act 1964, ss. 3, 50(1)

For the appellant - PG Cyril & Daniel Annamalai N Subramaniam; M/s Vignesh Kumar & Assocs
For the respondent - Tetralina Ahmd Fauzi; DPP

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Revision No: WA-44-12-01-2018 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang JCA:

[1] This appeal before us arose from the decision of the learned High Court Judge who dismissed the appellants' joint application for the following main relief, that is:

> that they be at liberty to attend before the Court to show cause on the date to be fixed why the property in the Schedule to Federal Government Gazette P.U.(B) 53 dated 13.2.212, should not to forfeited;

and be declared as *bona fide* third parties within the meaning of s. 61 of Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the Act"). The first appellant was acting as counsel for, whilst the second appellant was the legal advisor (employee) of Syarikat Noradz Travel & Services Sdn Bhd ("Noradz") who was charged, with three other persons, in the Sessions Court for offences under the Act (s. 4(1)) as well as under the Banking and Financial Institutions Act 1989 (BAFIA). These accused persons had been found guilty by the learned Sessions Court Judge and sentenced accordingly. The properties of Noradz had earlier been seized and forfeited under s. 55 of the Act and that order was gazetted *vide* the notification as stated above. The first appellant claimed that his legal and professional fees incurred whilst acting for Noradz in the High Court appeal and in the subsequent appeal and review application filed in this court amounting to RM1,539,800 has not been paid. The second appellant in turn claimed that his salary for November 2012 until the date of the application, that is, 28 January 2018 at RM12,500 per month have also not been paid. The total amount outstanding then was RM775,000. Thus, they both filed the said application to be allowed to present their claims which they contended ought to be paid to them from the forfeited property as they were, as stated earlier, both *bona fide* third parties under s. 61(4) of the Act.

[2] The learned High Court Judge dismissed the said application without hearing its merits because His Lordship was of the view that it should have been made in the Sessions Court first. He alluded to an earlier application filed by Noradz's previous counsel for their fees amounting to RM4.5 million which was rejected by the learned Sessions Court Judge but which decision was reversed by His Lordship on appeal. Filing the application straight away to the High Court was an abuse of the court's process, held His Lordship further.

[3] At the hearing of the appeal against the said decision before us, the learned Deputy Public Prosecutor (DPP) raised a preliminary objection on the following grounds:

(i) That the appeal was not competent;

(ii) That the appeal does not comply with s. 50 of the Courts of Judicature Act 1964 ("the CJA"); and

(iii) That the appeal was academic.

Issues (i) and (ii) are related and would be considered together.

Incompetent Appeal

[4] Section 50(1) of the CJA provides as follows:

> s. 50(1). Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court.

Decision on the other hand has been defined in s. 3 as follows:

> s. 3. Decision means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[5] Steve Shim CJ (S&S) in *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713 at p. 747 gave this guidance on how the courts should interpret statutes:

> The primary duty of the court is to give effect to the intention of the Legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words used have not acquired any technical meaning, they should be deemed to have been used in their ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary than to expound those words in their natural and ordinary sense. The words themselves alone in such cases best declare the intent of the lawgiver. (See: *Bindra's Interpretation of Statutes* - 8th Edition).

[6] It is clear from the said definition in s. 3 that there are two instances when a decision of the High Court is not appealable. The first is if it is made in the course of a trial and the second is when the hearing of the cause or matter does not dispose of the rights of the parties with finality. The clear intention of the Legislature expressed from the words used in the aforesaid section is to filter matters that can go up on appeal. In other words, a cap has been placed by the Legislature to ensure that appeals filed are not frivolous and there would not be undue delay in the disposal of trials by reason of such appeals being filed. Therefore, even though the order of the court was not made in the course of the trial, but if it does not dispose of the rights of the parties with finality, that decision is still unappealable, that is to say, there is no automatic right of appeal for such a decision made by the court. To say otherwise would run afoul of the clear intention of the Legislature as expressed in the said s. 3, which as we had stressed earlier, is to filter matters which can be further taken up on appeal before us.

[7] Thus, in this case, although the application was not filed and the decision made was not in the course of a trial, nevertheless it does not finally dispose of the rights of the appellants because the order of the learned High Court Judge was only to direct that the application be filed in the Sessions Court where as rightly pointed out by the learned High Court Judge, the source for payment of the claim, that is, the forfeited property was.

[8] It is obvious that the learned High Court Judge did not dismiss the application outright and therefore there is no final determination of the appellants' right by the court for that was being kept at abeyance until the disposal of it by the Sessions Court. This case is distinguishable from a similar one heard by this court, that is *Totti Trading v. PP* [2018] 7 CLJ 218 cited by the appellants before us because in the cited case, the forfeiture order was made against the appellant by the High Court upon application by the Public Prosecutor under s. 56 of the Act and it was only some five years later upon discovery of the order that the appellant filed the application to the High Court to set it aside. Coincidentally, it was the same learned High Court Judge as in this case before us that heard the application. The learned High Court Judge held that he had no jurisdiction to set aside the forfeiture order made earlier by a different High Court Judge and that the only course open to the appellant was to appeal as he could not exercise his inherent powers to set aside the forfeiture order. That decision was reversed by this court who held that indeed he had such inherent powers. From that brief narration of the facts above, and with respect to learned counsel for the appellants, the *ratio* is not applicable to us in this case as there was no issue about the High Court exercising its inherent jurisdiction for obviously, unlike the cited case, the forfeiture order was not made by that court but by the Sessions Court.

[9] Learned counsel for the appellants has another take on this issue. He submitted that the Sessions Court Judge (Tn Mat Ghani bin Abdullah) in this case was *functus officio* because he had heard similar claims by investors in Noradz and other counsel who acted for the accused persons. He did not allow their claims but instead ordered the forfeiture. The Sessions Court Judge, he submitted has therefore taken a position in making a ruling in the issue and by doing so has already completed his task on the forfeiture of Noradz's assets. Therefore, the appellants could not go back to the said court, he said further. Again with respect, we have to disagree with learned counsel for the learned Sessions Court Judge may be *functus officio* in respect of claims filed by the earlier claimants but not fresh claims made by the appellants. The appellants have the option to apply for their application to be heard before a different Sessions Court Judge if there exists a fear that this judge had already made up his mind on the issue given his earlier decisions. This consideration brings us to the second ground of decision.

Academic Appeal

[10] Following the dismissal of the appellants' application by the learned High Court Judge, the appellants did file their application before the Sessions Court. Their application was dismissed and the matter was brought up on appeal to the High Court. At the time of the hearing of this appeal before us, that appeal in the High Court was still pending. Therefore, submitted the learned DPP, this appeal before us was academic. Learned counsel for the appellants however said their filing of the application in the Sessions Court was merely to preserve the rights of their clients and to avoid being accused of laches. Besides, he further submitted, there was still a live issue before the court, which is the jurisdiction of the High Court to hear the application. That issue of jurisdiction has been dealt with by us earlier and as for the preservation of his clients' rights and avoidance of laches, these reasons simply could not stand as a ground to allow the appeal to go on because the simple and obvious fact is that the appellants had submitted themselves to the jurisdiction of the Sessions Court. Having done so, the full consequence of that action would be the litigation of that right not just in the Sessions Court but further to the High Court and before this court on appeal. Thus, their rights to be heard by all three tiers of the courts, as rightly conceded by them, had indeed been preserved. Issues ventilated before us such as jurisdiction of the court and the usage of s. 44 of the Act being the proper section of the Act to use to make the application as decided by the learned High Court Judge can still be raised by the appellant, before all three courts if the need arises.

[11] Accordingly, we allowed the preliminary objection of the learned DPP, with the end result that the appeal was dismissed and the decision of the learned High Court Judge was affirmed.